

Federal Sentencing

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GUIDE

**Federal Sentencing Guidelines
Circuits**

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Application Principles (Chapter 1)

8th Circuit says harmless *Erlinger* error did not establish compelling reason for compassionate release. (150) (540) Defendant sought compassionate release from his Armed Career Criminal Act sentence after *Erlinger v. U.S.*, 602 U.S. 821, 144 S. Ct. 1840, 219 L. Ed. 2d 451 (2024) held that the question of whether prior offenses occurred on different occasions must be determined by a jury beyond a reasonable doubt. The Eighth Circuit noted that *Rutherford v. U.S.*, 608 U.S. 454, 146 S. Ct. 1320, 225 L. Ed. 2d 60 (2026), and *U.S. v. Loggins*, 181 F.4th 883, 887 (8th Cir. 2026), held that nonretroactive changes in law cannot constitute extraordinary and compelling reasons for relief under § 3582(c)(1)(A)(i). In any event, any error was harmless because no rational jury could have found that defendant’s 1996 drug-possession offense and drug-conspiracy offense occurred on the same occasion because the possession offense occurred more than a year after the conspiracy began. *U.S. v. Faulkner*, __ F.4th __ (8th Cir. Sept. 8, 2026), No. 24-2296.

9th Circuit rules nonretroactive guidelines amendment cannot be grounds for compassionate release. (150) Defendant, serving a 24-year sentence for Hobbs Act robbery and firearms offenses, sought compassionate release based on several nonretroactive guidelines amendments. The Ninth Circuit held that § 1B1.13(b)(6) and (c), which exclude nonretroactive guidelines amendments from consideration as extraordinary and compelling reasons, are within the Sentencing Commission’s authority under 28 U.S.C. § 994(t). The court relied in part on *Rutherford v. U.S.*, 608 U.S. 454, 146 S. Ct. 1320, 225 L. Ed. 2d 60 (2026), which held that a disparity created by a nonretroactive statutory sentencing change is not an extraordinary and compelling reason. The court also rejected defendant’s argument that multiple nonretroactive amendments could be considered collectively. *U.S. v. Troiano*, __ F.4th __ (9th Cir. Sept. 14, 2026), No. 24-6621.

2nd Circuit reaffirms reliance on “intended loss” from fraud despite *Kisor*. (160)(219) Defendant was convicted of fraud and money laundering after using fraudulent identities to open 36 bank accounts and transfer millions of dollars. The district court added 18 levels under

§2B1.1(b)(1) based on \$4.5 million in intended loss even though the actual loss was much lower. The Second Circuit reaffirmed that §2B1.1 permits loss to be calculated as the greater of actual or intended loss, ruling that its precedent foreclosed defendant's argument that *Kisor v. Wilkie*, 588 U.S. 558 (2019), required disregarding the guidelines Commentary that defines loss to include intended loss. *U.S. v. Alisigwe*, ___ F.4th ___ (2d Cir. Sept. 17, 2026), No. 24-960.

9th Circuit holds "pattern" of sexual abuse may include prior conduct unrelated to instant offense. (160)(310) Defendant pleaded guilty to distributing and possessing child pornography. At sentencing, the district court added five levels under §2G2.2(b)(5) for a "pattern" of sexual abuse, based on facts underlying defendant's prior California convictions. The Ninth Circuit affirmed, holding that the guideline is ambiguous as to whether the required "pattern" must be related to the offense of conviction. Therefore, under *Kisor v. Wilkie*, 588 U.S. 558 (2019), the district court properly relied on the guidelines' Commentary to hold that the "pattern" includes prior sexual abuse regardless of when it occurred, whether it involved the same victim, or whether it resulted in a conviction. *U.S. v. Mendonsa*, ___ F.4th ___ (9th Cir. Sept. 16, 2026), No. 25-1517.

6th Circuit declines to remand to a different judge despite a two-year delay in handling §2255 motion. (197)(880) The Sixth Circuit declined to exercise its power under 28 U.S.C. §2106 to remand the case to a different district judge. Although the district court took two years to transfer the original §2255 motion, other postconviction litigation was pending during that period, and the judge had handled the case for more than a decade. The court also rejected defendant's claim that the judge's earlier decision to correct his sentence rather than to conduct a full resentencing demonstrated bias or improper motive. *In re Augustin*, ___ F.4th ___ (6th Cir. Sept. 15, 2026), No. 25-5655.

Offense Conduct (Ch. 2)

10th Circuit orders evidentiary hearing where counsel may have failed to advise of a viable fraud defense. (218)(880) Defendant pleaded guilty to bank fraud and aiding or assisting in filing a false tax return and was sentenced to concurrent terms of 48 and 36 months and ordered to pay \$3.9 million in restitution. The Tenth Circuit held that the statutory text and *Loughrin v. U.S.*, 573 U.S. 351, 134 S. Ct. 2384, 189 L. Ed. 2d 411 (2014), provided a reasonably available defense -- that merely writing valid

checks from an employer's account might not constitute bank fraud under 18 U.S.C. §1344(2) absent a false representation that induced the bank to part with its property. The court remanded for an evidentiary hearing on whether counsel performed deficiently and whether the advice affected defendant's decision to plead guilty. *U.S. v. Martin*, ___ F.4th ___ (10th Cir. Sept. 8, 2026), No. 24-3140.

1st Circuit holds constructive possession of firearms supported two-level dangerous-weapon increase. (240) Defendant was convicted of conspiracy and possession with intent to distribute fentanyl and cocaine and was sentenced to 84 months. The First Circuit affirmed the addition of two levels under §2D1.1(b)(1) because defendant constructively possessed two firearms found in a bedroom closet of the apartment he regularly used. Defendant had keys to the apartment, visited it nearly daily, stayed overnight about weekly, and changed clothes there, supporting an inference that he exercised control over the bedroom and was aware of the firearms. *U.S. v. Parsons*, ___ F.4th ___ (1st Cir. Sept. 11, 2026), No. 25-1443.

6th Circuit upholds 75:1 video-to-image conversion for five-level child porn increase. (310) Defendant pleaded guilty to receiving and distributing child pornography and received a 120-month sentence, below the 151-to-188-month guidelines range. The Sixth Circuit upheld a five-level increase under §2G2.2(b)(7)(D), based on treating each of defendant's 63 videos as 75 images, per the guidelines commentary and *U.S. v. Phillips*, 54 F.4th 374, 379–

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86 (6th Cir. 2022). The panel held that the 75:1 rule had not been overruled by *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 144 S. Ct. 2244, 219 L. Ed. 2d 832 (2024), while recognizing that there was a circuit split on the issue. *U.S. v. York*, __ F.4th __ (6th Cir. Sept. 14, 2026), No. 25-4032.

6th Circuit says 120-month sentence was not too high for producer of child pornography. (310)(741) Defendant pleaded guilty to receiving and distributing child pornography and received a 120-month sentence, below the 151-to-188-month guidelines range. The Sixth Circuit affirmed, finding that it was appropriate for the judge to consider defendant's role as a producer of child porn. The court added that the resulting below-guidelines sentence demonstrated that the court's focus on production did not unfairly prejudice defendant. *U.S. v. York*, __ F.4th __ (6th Cir. Sept. 14, 2026), No. 25-4032.

9th Circuit rejects categorical approach in finding "pattern" of sexual activity. (310) At sentencing for distribution of child porn, the district court added five levels under §2G2.2(b)(5) for a "pattern" of sexual abuse, based on facts underlying defendant's prior California convictions. The Ninth Circuit found that the "categorical approach" did not apply because the "pattern of activity" enhancement is conduct-based rather than conviction-based. Therefore, the district court properly considered the underlying facts, rather than being restricted to the statutory elements of defendant's prior offenses. *U.S. v. Mendonsa*, __ F.4th __ (9th Cir. Sept. 16, 2026), No. 25-1517.

9th Circuit finds reliable hearsay underlying prior convictions supported "pattern" increase. (310)(770) The Ninth Circuit held that, in finding a "pattern" of sexual abuse, the district court properly relied on police reports, charging documents, and court records underlying defendant's prior convictions. Hearsay is permissible at sentencing when supported by sufficient indicia of reliability, and the victims' accounts in the police reports substantially corresponded with the conduct charged in the state proceedings. The passage of time and inability to cross-examine the original sources did not, standing alone, make the evidence unreliable. *U.S. v. Mendonsa*, __ F.4th __ (9th Cir. Sept. 16, 2026), No. 25-1517.

8th Circuit upholds guidelines firearms sentence based on diversion of gambling winnings from child support. (330) Defendant pled guilty to being a felon in possession of a firearm after fleeing from a traffic stop while armed. He was sentenced to 126 months, within the 110–137-

month guidelines range. The Eighth Circuit found no error in treating defendant's prior unlawful-betting conviction as aggravating because he used a false identity to collect \$44,000 in gambling winnings while owing substantial child support. In any event, there was no plain error because the court relied principally on defendant's armed flight, extensive criminal history, and escalating criminal conduct. *U.S. v. Martin*, __ F.4th __ (8th Cir. Sept. 10, 2026), No. 24-2816.

11th Circuit reverses career offender increase that was based on post-offense change to guidelines. (330)(520) Defendant was convicted of Hobbs Act robbery and brandishing a firearm in furtherance of a crime of violence and received a 324-month sentence. The district court applied the 2023 Guidelines Manual, which, following Amendment 822, classified Hobbs Act robbery as a crime of violence for purposes of the career-offender enhancement. However, because defendant committed the offense in March 2023, before the amendment's effective date, the Ex Post Facto Clause required application of the 2021 Guidelines Manual, under which binding precedent held Hobbs Act robbery was not a crime of violence. The error was plain and required reversal. *U.S. v. Brown*, __ F.4th __ (11th Cir. Sept. 9, 2026), No. 24-10289.

10th Circuit remands tax case to decide if, given correct advice, defendant would have rejected plea offer. (370)(790)(880) Counsel improperly conceded at the plea hearing that for tax fraud under 26 U.S.C. §7206(2), defendant need only have intentionally committed the acts charged, when in fact the statute requires proof that defendant knowingly and willfully violated a known legal duty. Although the district court correctly found counsel deficient, the Tenth Circuit held that it improperly treated good faith as a defense that defendant bore the burden of establishing rather than requiring the government to prove willfulness as an element. The court therefore remanded to determine whether there was a reasonable probability that, with correct advice, defendant would have rejected the plea and proceeded to trial. *U.S. v. Martin*, __ F.4th __ (10th Cir. Sept. 8, 2026), No. 24-3140.

Adjustments (Chapter 3)

2nd Circuit upholds obstruction increase based on defendant's false testimony at duress hearing. (461) The district court added two levels under §3C1.1 after finding that defendant fabricated a story that unidentified men had threatened his family and thereby forced him to participate in the fraud scheme. The Second Circuit affirmed, finding sufficient evidence to support the court's ruling. The dis-

dict court was not required to use the specific words “willful” or “willfulness” where its findings established the necessary elements of perjury. *U.S. v. Alisigwe*, __ F.4th __ (2d Cir. Sept. 17, 2026), No. 24-960.

Criminal History (§4A1.1)

1st Circuit finds defendant ineligible for zero-point reduction where he constructively possessed firearms. (500) The First Circuit upheld the district court’s denial of the two-level reduction under §4C1.1(a) for defendants with zero criminal history points, because he constructively possessed firearms in connection with the offense. The panel rejected defendant’s argument that the identically-worded safety-valve in §5C1.2(a)(2) did not include constructive possession. *U.S. v. Parsons*, __ F.4th __ (1st Cir. Sept. 11, 2026), No. 25-1443.

Determining the Sentence (Ch. 5)

6th Circuit says condition barring contacting any member of Congress was overbroad, but did not require reversal. (580) Defendant pleaded guilty to repeatedly threatening members of Congress and was sentenced to 24 months’ imprisonment and one year of supervised release. As a condition of release, the district court prohibited defendant from contacting any member of Congress or congressional staff, directly or indirectly, by any means and for any purpose. The Sixth Circuit held that this condition violated 18 U.S.C. §3583(d)(2) because it imposed a greater deprivation of liberty than reasonably necessary and burdened defendant’s First Amendment rights of speech and petition. Nevertheless, defendant failed to object in the district court, and the error was not sufficiently obvious or clear to warrant reversal. *U.S. v. Hayes*, __ F.4th __ (6th Cir. Sept. 15, 2026), No. 25-5893.

Sentencing Hearing

11th Circuit upholds reliance on expert who independently analyzed DNA profiles generated by others. (770) Defendant argued that a DNA analyst violated the Confrontation Clause by testifying even though he did not perform the hands-on laboratory testing or prepare the original report. The Eleventh Circuit held that the analyst’s testimony was distinguishable from *Smith v. Arizona*, 602 U.S. 779, 144 S. Ct. 1785, 219 L. Ed. 2d 420 (2024), because he independently repeated the comparison analysis, reached his own conclusions, and did not merely relay another analyst’s findings. His testimony concerning the laboratory’s general procedures likewise did not implicate *Smith*. *U.S. v. Brown*, __ F.4th __ (11th Cir. Sept. 9, 2026), No. 24-10289.

Plea Agreements

5th Circuit rules career offender error is not a miscarriage of justice to overcome waiver of appeal. (780) Defendant pleaded guilty to robbery and waived his right to appeal any sentence within the statutory maximum or ineffective assistance of counsel. However, defendant appealed his career offender sentence, arguing that his prior Louisiana drug conviction was not a proper predicate for the career-offender enhancement under §4B1.1 because Louisiana’s definition of marijuana included hemp. The Fifth Circuit held that any error did not satisfy the “high bar” established by *Hunter v. U.S.*, 146 S. Ct. 1702 (2026), for a miscarriage of justice. The issue was unsettled, unpublished decisions finding error were decided after defendant’s sentencing and were not binding, and there was a circuit split on the question. Such an ordinary or uncertain guidelines error could not constitute the egregious error necessary to invalidate the appeal waiver. *U.S. v. Chaney*, __ F.4th __ (5th Cir. Sept. 18, 2026), No. 23-30454.

Violations of Supervised Release

5th Circuit upholds revocation sentence despite consideration of post-supervised-release conduct. (800) Defendant’s supervised release was revoked after he absconded from supervision in 2020 and later failed to comply with bond-related residential-reentry requirements. In *Rico v. U.S.*, 607 U.S. 609, 146 S. Ct. 947, 224 L. Ed. 2d 431 (2026), the Supreme Court held that the term of supervised release is not tolled by the defendant’s abscondment from supervision, unless a warrant is issued before the term expires. Here, a warrant was timely issued, and it was not plain error for the district court to consider defendant’s post-release failure to report to a residential reentry center. *U.S. v. Johnson*, __ F.4th __ (5th Cir. Sept. 8, 2026), No. 24-30803.

6th Circuit holds upward variance despite guidelines accounting for repeated supervised-release violations. (800) Defendant’s supervised release was revoked after his third alcohol-related violation, including a drunk-driving crash that injured a child. The district court varied upward to 24 months from the 8–14-month guidelines range. The Sixth Circuit affirmed, rejecting defendant’s argument that the court improperly double-counted his DUI history because the guidelines already accounted for it, explaining that a district court may rely on its independent assessment of criminal history when imposing a sentence above the

advisory range. *U.S. v. Croom*, __ F.4th __ (6th Cir. Sept. 11, 2026), No. 25-3864.

Habeas Corpus/ §2255 Motions

6th Circuit holds §2255 motion challenging amended judgment was not “second or successive.” (880) After the district court vacated defendant’s 18 U.S.C. § 924(c) conviction under *U.S. v. Davis*, 588 U.S. 445 (2019), it left unchanged his 380-month sentence on five other counts, and entered an amended judgment. Defendant promptly filed a new §2255 motion to vacate those remaining convictions. The Sixth Circuit held that the motion was not “second or successive” because it challenged a new judgment created after the original judgment was vacated. It makes no difference whether the district court fully resentences the defendant or merely corrects the sentence after vacating the original judgment; the original judgment is void ab initio and the amended judgment is a new judgment subject to collateral attack. *In re Augustin*, __ F.4th __ (6th Cir. Sept. 15, 2026), No. 25-5655.

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